

*a***IJM CONSTRUCTION SDN BHD****v.****CLEVELAND DEVELOPMENT SDN BHD***b*

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-105-1998]
8 FEBRUARY 2001

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CIVIL PROCEDURE: *Injunction - Interlocutory injunction, application for - To preserve status quo of parties until final adjudication - Whether plaintiff had substantive cause of action*

CONTRACT: *Performance bond - Whether plaintiff had right to challenge validity of - Whether it formed part of underlying contract*

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The plaintiff was appointed by the defendant as a contractor to complete certain scope of works. He subsequently fulfilled the contract, but the defendant, who had earlier paid the plaintiff RM2,656,211.80, failed to pay the remainder sum of RM391,116.67 due to the plaintiff. Therefore, the plaintiff filed the present suit against the defendant for the recovery of the

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remainder sum.

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The defendant raised two issues as grounds to stop payments. First, it put forward that the water proofing system done by the plaintiff was defective, and that the plaintiff also did not provide a full and comprehensive warranty on the system as previously agreed. Second, that the performance bond provided by the plaintiff to the defendant was in favour of the defendant, and that the plaintiff had no locus standi to challenge its validity.

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The plaintiff however averred that the performance bond was defective and invalid because it was wanting in particulars and not signed by the defendant, and that a call on the performance bond ought not to have been made without reference to the underlying contract due to the fact that the performance bond was collateral to the main contract. The plaintiff also applied for an interlocutory action to be given against the defendant with the purpose of preserving the *status quo* of the parties until final adjudication of the rights of the parties.

*h***Held:***i*

[1] In respect of the water proofing system, it should be construed to be a triable issue that would warrant a full blown trial. Arguments supported by affidavit evidence would not be sufficient to substitute the trial of the issue at hand.

- [2] Since reference to the performance bond was made in the underlying contract to which the plaintiff was privy, this meant that either party had the right to question the validity of the performance bond. Therefore, the plaintiff certainly had the *locus standi* to challenge the validity of the contract. a
- [3] The plaintiff's cause of action was founded on the breach of an underlying contract which was a triable question of law. Hence, there was a substantive cause of action that entitled the plaintiff to the interlocutory relief of an injunction. b
- [4] There were two major factors in favour of the plaintiff. Firstly, the issue of "damage to reputation", and, secondly, that there was a very strong *prima facie* case that the performance bond was invalid and void. c

[Order accordingly.]

Case(s) referred to:

- Alfred Dunhill Ltd v. Sunoptic SA* [1979] FSR 337 (**refd**) d
- American Cyanamid Co v. Ethicon Ltd* [1975] AC 396 (**refd**)
- Associated Newspapers Group v. Insert Media Ltd* [1988] 2 All ER 420 (**refd**)
- Bocotra Construction Pte Ltd v. Attorney-General* [1995] 2 SLR 523 (**refd**)
- Bocotra Construction Pte Ltd & Ors v. Attorney General (No 2)* [1995] 2 SLR 733 (**refd**) e
- Bolivinter Oil SA v. Chase Manhattan Bank* [1984] 1 Lloyd's Rep 251 (**refd**)
- Bolivinter Oil SA v. Chase Manhattan Bank* [1984] 1 WLR 392 (**refd**)
- Brody White & Co v. Chemet Handel Trading (S) Pte Ltd* [1993] 1 SLR 65 (**refd**)
- Cayne v. Global Natural Resources plc* [1984] 1 All ER 225 (**refd**)
- Edward Owen Engineering Ltd v. Barclays Bank International Ltd* [1978] 1 QB 159 (**refd**) f
- EM and EM Associates v. Delhi Development Authority* [1986] 30 DLT 163 (**refd**)
- Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283 (**refd**)
- Films Rover International Ltd v. Cannon Film Sales Ltd* [1987] 1 WLR 672 (**refd**)
- GKN Contractor Ltd v. Lloyds Bank plc* [1985] 30 Build LR 48 (**refd**)
- Government of Malaysia v. Lim Kit Siang, United Engineers (M) Berhad v. Lim Kit Siang* [1988] 1 CLJ 219 (**refd**) g
- Hemis Interco BV Sdn Bhd v. Syarikat Pembinaan Hashbudin (M) Sdn Bhd* [1986] 1 CLJ 562 (**refd**)
- High Mark (M) Sdn Bhd v. Pacto Malaysia Sdn Bhd* [1985] 1 CLJ 100 (**refd**)
- Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 MLJ 230 (**refd**)
- Hong Kong Vegetables Oil Co v. Malin Sirinaga Wicker & Ors* [1978] 2 MLJ 13 (**refd**) h
- IE Contractors Ltd v. Lloyds Bank plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496 (**refd**)
- IE Contractors Ltd v. Lloyds Bank plc and Rafidain Bank* [1991] 51 Build LR 1 (**refd**) i

- a** *Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors* [1995] 1 MLJ 193 (*refd*)
Kvaerner Singapore Pte Ltd v. UDL Shipbuilding (Pte) Ltd [1993] 3 SLR 350 (*refd*)
Potton Homes Ltd v. Coleman Contractors Ltd [1984] 28 Build LR 19 (*refd*)
RCA Sdn Bhd v. Pekerja-pekerja RCA Sdn Bhd & Ors [1991] 1 MLJ 309 (*refd*)
RD Harbottle v. National Westminster Bank [1977] 2 All ER 862 (*refd*)
- b** *Royal Design Studio Pte Ltd v. Chang Development Pte Ltd* [1991] 2 MLJ 229 (*refd*)
Tan Sri Hj Othman Saat v. Mohamed Ismail [1982] 2 MLJ 177 (*refd*)
United Asian Bank Bhd v. NK Doshi K Doshi [1990] 2 CLJ 721 (*refd*)
Royal Design Studio v. Chang Development [1991] 2 MLJ 229 (*refd*)
- Legislation referred to:**
- c** Contracts Act 1950, ss. 79, 80, 81
 Rules of the High Court 1980, O. 29 rr. 1(1), (2)
 Government Proceeding Act (Cap 121) [Sing], s. 27(1)
- Other source(s) referred to**
- d** *Interlocutory Injunctions*, Tan Woon Tiang and Koh Kok Wah, 1992 edn, p 8
Malaysian High Court Practice, 1998, Desk Edition
Nelson's Law Of Injunctions, 1996, 3rd edn
For the plaintiff - Shanmugaraj CT Pillai; *M/s Ngae, Shan, Kalai & Co*
For the defendant - Johanan A. Puthuchear; *M/s Kuok & Puthuchear*
- e** *Reported by Suresh Nathan*

JUDGMENT

Abdul Malik Ishak J:

f **Introduction**

By way of encl. 29, the plaintiff sought for the following orders:

- g** (a) that an interlocutory injunction be given against the defendant until the conclusion of this action in court or, in the alternative, until the disposal of the arbitration proceedings to restrain the defendant personally and/or its representatives and/or its agents and/or its workers from receiving any payment from Standard Chartered Bank Malaysia Bhd and/or its representatives and/or its agents and/or its workers under performance bond no. 300020128832 dated 7th September 1996.
- h** (b) that a return date be fixed by this Honourable Court on the 28th day of August 1998.
- (c) that the costs of this application be costs in the cause.
- i** (d) any other relief that this Honourable Court deems fit and proper to award.

and it was supported by an affidavit of Hiew Yet Kuei (“Hiew”) that was affirmed on 15 August 1998 as seen in encl. 28; while Loh Lim Fa (“Loh”) affirmed an affidavit in reply for the defendant on 24 August 1998 as reflected in encl. 32.

Facts

I shall refer to the two affidavits in encls. 28 and 32 in order to galvanise the facts. Before I begin, it would be appropriate to state that the plaintiff has filed its writ and the statement of claim as seen in encl. 2. The parties agreed that the statement of defence would be filed at a later stage.

Hiew’s affidavit revealed the following salient facts. By way of a written contract dated 26 March 1997 that was entered into between the plaintiff and the defendant (hereinafter referred to as the “contract”), the defendant appointed the plaintiff as a contractor for the execution and completion of the scope of works known as “Earthworks, Sheet Piling and Soldier Piling, Spun Piling, Pile Caps and Substructure Works for Proposed Commercial cum Hotel Development at Lot 346, Jalan Lombong, Kota Tinggi, Johor Bahru, Malaysia” (hereinafter referred to as the “works”) for a contract sum of RM2,557,027.90 or such other sum as shall become payable at the times and in the manner specified in the conditions of the contract. The contract was entirely modelled on the Standard Pam Form of Building Contract, Private Edition (With Quantities) together with the amplification notes, amendments, modifications and supplementary clauses (hereinafter referred to as the “contract documents”). The architect for the works was none other than akitek Detco while the engineer and the superintending officer for the works was Zainal Abidin jurutera perunding. The quantity surveyor for the works was a company known as KBC Quantity Surveyors Sdn Bhd.

The plaintiff had dutifully executed and completed the works under the contract and in due course the certificate of practical completion was issued on 28 August 1997 by the settlement officer certifying that the date of practical completion for the works was supposed to be on 14 August 1997. The defect liability period under the contract commenced on 28 August 1997 and it was scheduled to expire on 14 August 1998 – a period of time that spanned almost to 12 months. The total final contract sum which included variation for the works was valued by the quantity surveyor and certified by the settlement officer as RM3,111,254.17 (hereinafter referred to as the “final contract sum”). It must be borne in mind that the defendant was a good paymaster and had paid the plaintiff a total sum of RM2,656,211.80 under interim valuation certificates numbers one to nine which were valued by the quantity surveyor and duly certified and recommended by the superintending officer.

- a* By letter dated 11 September 1997 addressed to the superintending officer, the quantity surveyor forthwith issued the interim valuation certificate number ten which valued the amount that was due from the defendant to the plaintiff at RM391,116.67. The superintending officer by letter dated 12 September 1997 certified and enclosed the interim valuation certificate number ten to the defendant for payment of the recommended sum of RM391,116.67. Out of that sum, a sum of RM63,925.70 being 2.5% of the final contract sum had been retained by the defendant as the retention sum. But the defendant failed to honour the interim valuation certificate number ten within the period for honouring certificate as provided in cl. 30(1) of the conditions of contract.
- b* Alarmed at this state of affairs, the plaintiff expeditiously filed the present suit against the defendant for the sum of RM391,116.67 being the amount duly certified under the interim valuation certificate number ten.
- c*

- In the meantime, the defendant filed an application for a stay of the proceeding pending arbitration. In this context, the summons in chambers dated 20 April 1998 as seen in encl. 8 and the relevant affidavits filed by the plaintiff and the defendant in relation to the application must surely make for interesting reading.
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- It must be stressed that despite repeated demands by the plaintiff and by the plaintiff's solicitors *vide* their letter of demand dated 21 January 1998, the defendant had failed, refused and/or neglected to honour the interim valuation certificate number ten by not paying the amount due and recommended which came up to RM391,116.67 or any part thereof.
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- The defendant challenged Hiew's affidavit in encl. 28 and raised two issues, namely:
- f*

- (1) water proofing works were said to be defective; and
- (2) performance bond which was said to be in favour of the defendant.

g **Water Proofing Works**

- It was the stand of the plaintiff that this did not form part of the original scope of works but rather it was a mere variation. It was said that during the execution of the works, the plaintiff was instructed to make the necessary proposal in relation to the water proofing system and the plaintiff had complied by way of a letter dated 28 December 1996 (see the letter marked as exh. "HYK3" of encl. 28). By that letter, the plaintiff proposed the water proofing system and the superintending officer subsequently approved that method. Works were then done under the supervision of the superintending officer and those works were certified as practically complete by the superintending officer. Surprisingly before the plaintiff commenced action to demand for the payment of the outstanding sum as alluded to above, the issue
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of defects in the water proofing works was not raised by the defendant as a ground to stop payments. There were letters dated 20 November 1997, 29 November 1997, and 30 November 1997 which were alluded to by the defendant in the defendant's affidavit dated 20 April 1998 in support of the defendant's summons in chambers application for a stay of proceeding pending reference to arbitration as seen in encl. 8. Those letters indicated that the superintending officer was satisfied with the progress of the rectification works and that the plaintiff undertook the rectification works without complaint, protest or dispute and the plaintiff further expressly provided a warranty for the water proofing system for a duration of ten years. It transpired that the total value of the works for the water proofing system came up to RM133,975 and out of that sum, a sum of RM33,925 was certified under the interim valuation certificate number ten. But the remainder of the value of the water proofing system had not been certified even though the claim had been submitted (see the interim valuation certificate number ten, a copy thereof at exh. "HYK4" of encl. 29). Now, it would be pertinent to point out that the defendant retained a sum of RM63,925.70 as retention fund, which would be used for defects, if any, in accordance with the provisions of the contract. It was said that together with the outstanding payment under the interim valuation certificate number ten that came up to RM391,116.67, the defendant held a total sum of RM455,042.37 and the defendant too had not taken any steps as required to certify the completed works amounting to approximately RM100,050.

According to the defendant, by letter of award dated 5 September 1996, the plaintiff was to have furnished to the defendant a full and comprehensive warranty on the water proofing system installed by the plaintiff in accordance with the approved plan. But to date, it was said that the plaintiff had failed to furnish the same. It was said that the plaintiff did not agree with the form of water proofing warranty that was prepared by KBC Quantity Surveyor and the plaintiff had refused to execute the same (see the letter dated 19 January 1998 from KBC Quantity Surveyors Sdn Bhd addressed to akitek Detco together with a letter dated 19 March 1998 from the plaintiff to akitek Detco – all collectively marked as exh. "LKF-45" of encl. 32). It was said that a special meeting was held at the defendant's office on 23 April 1998 where the lawful representatives of the defendant and the plaintiff were present and at that meeting it was explained that the civil and structural engineer was unable to certify the water proofing system on the ground that the workmanship was poor. At that meeting it was acknowledged, so it was said, that the plaintiff was unable to provide its full undertaking or warranty as initially agreed. The minutes of that meeting can readily be seen in exh. "LKF46" of encl. 32 and that minutes were recorded in a brief fashion.

- a* All said and done, I must say that the water proofing works must surely be construed to be a triable issue that warrant a full blown trial. Arguments supported by affidavit evidence would not be sufficient to substitute the trial of the issue at hand.

b **Performance Bond**

- It would be apparent that a performance bond to the tune of RM128,000 was provided by the plaintiff to the defendant for the performance of the duties and obligations of the plaintiff under the contract. The performance bond was also extended to cover the defect liability period and the performance bond was scheduled to expire at 3.00p.m. on 14 August 1998. That performance bond can readily be seen in exh. "HYK5" of encl. 28 which was issued by Standard Chartered Bank in favour of the defendant together with the amendment thereto which extended the period of the performance bond to 14 August 1998. That performance bond was worded in this way:

- d* Date: 7th September 1996

Dear Sir

OUR GUARANTEE NO. 300020128832 FOR RM128,000.00

- e* THIS AGREEMENT is made the 7th day of September 1996 BETWEEN STANDARD CHARTERED BANK MALAYSIA BERHAD of No. 2, Jalan Ampang, 50450 Kuala Lumpur (hereinafter called the 'Guarantor') of the one part and CLEVELAND DEVELOPMENT SDN BHD (hereinafter called 'the Principal') of the other part.

- f* WHEREAS:

- (1) This Agreement is supplemental to a Contract (hereinafter called the 'Contract') made between IJM CORPORATION BERHAD (hereinafter called the 'Contractor') of the one part and the Principal of the other part whereby the Contractor agreed and undertook to construct, complete and maintain the Proposed 'EARTHWORKS, SHEET PILING AND SOLDIER PILING, SPUN PILING, PILE CAPS AND SUBSTRUCTURE WORKS FOR PROPOSED COMMERCIAL CUM HOTEL DEVELOPMENT ON LOT NO. 346, JALAN LOMBONG, KOTA TINGGI, JOHOR, MALAYSIA' (hereinafter called the 'Works') for the sum of RM2,557,027.90 (RINGGIT MALAYSIA: TWO MILLION FIVE HUNDRED FIFTY SEVEN THOUSAND TWENTY SEVEN AND CENTS NINETY ONLY).

- (2) The Guarantor has agreed to provide the guarantee under the Preliminaries and General Condition of the Contract.

- i* Now the Guarantor hereby agrees with the Principal as follows:

- 1) The Guarantor shall on DEMAND pay to the Principal such sum not exceeding RM128,000.00 (RINGGIT MALAYSIA: ONE HUNDRED TWENTY EIGHT THOUSAND ONLY) and shall be certified by the S.O. named in the Contract as being due to the Principal by reason of and/or in connection with the Contractor's failure to execute/complete the Contract and/or the Contractor's breach of his obligation(s) thereunder which certificate shall be accepted by the Guarantor without dispute. *a*
- 2) The Guarantor shall not be discharged or released from this Guarantee by any arrangement between the Contractor and the Principal with or without the consent of the Guarantor or by any alteration in the obligations undertaken by the Contractor or by any forbearance whether as to payment, time, performance or otherwise, but the Guarantor shall be entitled to be informed of such arrangement or alteration. *b*
- 3) This Guarantee shall not for any reason whatsoever be determined unless and until the S.O. shall have certified that the Contractor has performed and completed all his obligations under the Contract and that there is no money owing by the Contractor to the Principal under the Contract. *c*
- 4) Notwithstanding any provisions hereinbefore to the Contrary, this guarantee is effective from 18/9/96 and shall expire on 18/4/98 at 3.00 p.m. All claims if any must be made in writing and received by the Guarantor on or before 18/4/98 at 2.00 p.m. after which date it is automatically cancelled and no claim hereunder will be accepted or entertained. *d*

Given under our hand the date first abovementioned.

Signed for and on behalf of the) FOR STANDARD CHARTERED

STANDARD CHARTERED)	BANK MALAYSIA BHD	<i>f</i>
BANK MALAYSIA BHD)	Sgd. (Illegible)	
In the presence of:	...	
	P.MANAGER	

FOR STANDARD CHARTERED *g*
BANK MALAYSIA BHD
Sgd. (Illegible)

...
P. MANAGER
(Witness) *h*

Signed for and on behalf of the)
said Contractor in the presence of:) Unsigned
(Witness) Unsigned

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- a** There was a slight amendment to the performance bond and that amendment can also be seen in exh. "HYK5" of encl. 28. That amendment was worded as follows:

Standard Chartered

- | | | | |
|----------|---|--|--|
| b | SPECIAL OPS TRADE SERV
NO. 2, JALAN AMPANG
P.O. BOX 13566
50814 KUALA LUMPUR
MALAYSIA | AMENDMENT
TO
LETTER OF
GUARANTEE
DATE: 20 APR 90 | OUR REF NO:
300020128832 AP
AMD: NO 01 |
|----------|---|--|--|

- | | | |
|----------|--|------------------------------|
| c | TO:
CLEVELAND DEVELOP-
MENT SDN. BHD.
SUITE 25.01, LEVEL 25
PUBLIC BANK TOWER
JLN. WONG AH FOOK
80000 JB | AMOUNT
MYR 128,000.00 *** |
|----------|--|------------------------------|

- d** AT THE REQUEST OF OUR PRINCIPAL IJM CORPORATION BERHAD WISMA IJM JALAN YONG SHOOK LIN P.O. BOX 504 (JALAN SULTAN) 46760 PETALING JAYA, SELANGOR., THE ABOVEMENTIONED LETTER OF GUARANTEE IS AMENDED AS FOLLOWS:

- e** EXPIRY DATE NOW AMENDED TO READ 14 AUG 98 AT 3.00PM, CLAIMS IF ANY, MUST BE MADE IN WRITING AND RECEIVED BY US ON OR BEFORE 14 AUG 98 AT 2.00 PM., AFTER WHICH DATE IT IS AUTOMATICALLY CANCELLED AND SHALL BE CONSIDERED NULL AND VOID IRRESPECTIVE OF WHETHER OR NOT THE GUARANTEE IS RETURNED TO US FOR CANCELLATION AND NO
- f** CLAIM HEREUNDER WILL BE ACCEPTED OR ENTERTAINED.

ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED.

- g** On 13 August 1998, the plaintiff received a call from David Chui of Standard Chartered Bank relaying the message that the defendant had called upon the performance bond on 12 August 1998. But Standard Chartered Bank refused to release any document or provide further information in regard to the reason upon which the performance bond was called upon.

- h** Now, basically a performance bond is also known as a performance guarantee and it is essentially a collateral contract. That being the case it should be treated as a mere contract and be accorded the necessary interpretation as a contract. But great care must be adopted in drafting a performance bond because when the call has been made on the performance bond the bank must proceed expeditiously to pay unless there is fraud involved (*GKN Contractor Ltd v. Lloyds Bank plc* [1985] 30 Build LR 48; and *United Asian Bank Bhd*
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v. *NK Doshi K. Doshi* [1990] 2 CLJ 721) or unless there is a challenge as to the validity of the performance bond. As a contract of guarantee, the performance bond would be caught under the Contracts Act 1950 especially ss. 79 to 81 thereto. It there is a failure of consideration as envisaged in *Potton Homes Ltd v. Coleman Contractors Ltd* [1984] 28 Build LR 19, the court is certainly empowered to prevent a call on the performance bond. In the context of the present case, the performance bond was left unsigned by the defendant and its validity was put into question. And this made the present case poles apart from the other cases on performance bonds which will be alluded to in the later part of this judgment.

The stand of the defendant was quite simple. According to the defendant, the performance bond that was given by Standard Chartered Bank to the defendant was in fact subject to a demand by the defendant coupled with a certification by the superintending officer in the manner as set out in the performance bond. The defendant asserted that it had duly complied with the terms of the performance bond and that it had been activated in accordance with the terms as set out therein. The defendant asserted that upon certification by the superintending officer, Standard Chartered Bank was obliged to accept such certificate and demand without dispute. The defendant also asserted that Standard Chartered Bank was not obliged to investigate any further into the matter before making the necessary payment. A letter dated 11 August 1998 from the civil and structural engineer to the Standard Chartered Bank as seen in exh. "LKF47" of encl. 32 was alluded to and that letter showed that the superintending officer had certified the default of the plaintiff. Another letter bearing the same date, namely, August 11, 1998 from the defendant to Standard Chartered Bank was also alluded to and that letter was in the nature of a formal demand and it was worded as follows (see exh. "LKF47" of encl. 32):

RE: GUARANTEE NO. 300020128832 DATED 7TH SEPTEMBER 1996
AS RENEWED VIDE AMENDMENT DATED 20TH APRIL 1998
- DEMAND BY THE PRINCIPAL

We refer to the above and as principal named in the aforesated Guarantee, we wish to inform you that we are making a demand for the sum as stated in the Guarantee as the Contractor has failed to complete or execute the Contract in conformity with the requirements of the Contract and/or the Contractor is in breach of his obligations under the same Contract.

Accordingly in pursuant to clause (1) of the Guarantee, we hereby demand that you pay to us the sum of RM128,000 arising out of and or in connection with the default of the Contractor as duly certified by the S.O. named in the Contract as being due to us by reason of and/or in connection with the Contractor's

- a* failure to execute or complete the Contract and or the Contractor's breach of his obligations under the Contract. We attach herewith a copy of the S.O. certification (with attachments) accordingly.

Kindly issue your payment of the same to us immediately.

- b* Basically, this was a claim by the plaintiff for the sum of RM391,116.67 that was due under the interim certificate number ten. According to the defendant, the plaintiff had not set out in its claim, any declaration for, or a permanent injunction for, the restraint on the defendant in respect of the monies due under the performance bond. The plaintiff took exception when the defendant submitted that the plaintiff did not have a substantive action in respect of its interlocutory relief.
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Shorn of any tautology, the main thrust of the plaintiff's arguments may be summarised in this way:

- d* (1) that the performance bond was not signed by the defendant, and it was wanting in particulars thereby rendering it defective and invalid; and
- (2) that a call on the performance bond by the defendant ought not to have been made without reference to the underlying contract bearing in mind that the performance bond was collateral to the main contract.

- e* Several issues were canvassed by the parties and I shall in due course refer to them not in its order of priority. But before I proceed any further, I must put on record my gratitude to Mr. Shanmugaraj C.T. Pillai who acted for the plaintiff and Mr. Johanan A. Puthucheariy who acted for the defendant for their remarkable submissions which showed the depth of their thoughts and their love for the law. I will now proceed to examine those issues.
- f*

Whether The Plaintiff Has The *Locus Standi* To Challenge The Validity Of The Performance Bond?

- g* Mr. Johanan A. Puthucheariy for the defendant took exception to the use of the phrase "*locus standi*". He submitted that Mr. Shanmugaraj C.T. Pillai for the plaintiff had unnecessarily used the labels like "*locus standi*" and "privity of contract" to cloud the main issue before the court. It was the submission of Mr. Johanan A. Puthucheariy that the question to pose would be in this fashion: Whether a party, at whose instruction a performance bond is issued,
- h* may challenge the validity of the performance bond? The case of *Hemis Interco BV Sdn Bhd v. Syarikat Pembinaan Hashbudin (M) Sdn Bhd* [1986] 1 CLJ 562 was heavily relied upon by the defendant in an attempt to answer the question posed by the defendant. That was a High Court decision of VC George J. (as he then was). In that case, the defendant was one of the main
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contractors in the Penang bridge project. The plaintiff, on the other hand, was one of the sub-contractors engaged by the defendant. Universal Life General Insurance Sdn Bhd gave a performance guarantee to the defendant main contractor regarding the work of the plaintiff subcontractor. Soon thereafter the defendant main contractor repudiated the contract with the plaintiff subcontractor. The plaintiff subcontractor then caused a writ to issue and the plaintiff subcontractor also obtained *ex parte* an interlocutory injunction restraining the defendant main contractor from seeking payment from the guarantor – namely, the insurance company, under the performance bond. Apart from that, the plaintiff subcontractor also contested the validity of the guarantee bond on the grounds that it was not signed by the defendant main contractor and that it was also wanting in particulars and as such it was defective and invalid. The plaintiff subcontractor also alleged that it was wrongful repudiation of the contract by the defendant main contractor that had resulted in the non-performance of the contract by the plaintiff subcontractor. VC George J (as he then was) held that the plaintiff subcontractor cannot challenge the validity of the guarantee bond. Its validity was said to be a matter between the defendant main contractor and the insurance company. It was also held that the insurance company will have to pay out the amount guaranteed unless as provided in the agreement the subcontractor was relieved from performance by any clause of the contract or by statute or decision of a tribunal which was not the case here. It was also held that if the defendant main contractor had acted unreasonably or was responsible for forcing the plaintiff subcontractor not to perform, the plaintiff subcontractor's remedy was to sue the defendant main contractor for damages which it had already done. At p. 564 of the report, his Lordship had this to say:

In my judgment, the subcontractor, having admittedly delivered the 'insurance guarantee agreement' to the main contractor in purported compliance with the contractual requirement to provide the required performance bond, cannot be heard to challenge its validity. In any event the issue of its validity seems to me to be a matter between the alleged parties to the agreement, namely, the main contractor and the insurance company.

Continuing at the following page of the report of the same case his Lordship VC George J (as he then was) said:

It might very well be that the main contractor was in breach of the contract and had acted unreasonably or was responsible for forcing the subcontractor not to perform. But on the principles laid down in *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd* [1978] 1 Q.B. 159 and also in *R.D Harbottle v. National Westminster Bank* [1977] 2 All E.R. 862, the guarantor cannot be prevented from paying out the money demanded. In my judgment, it follows that neither can the main contractor be restrained from recovering the money. In providing the performance bond, it will have to be assumed that

- a* the subcontractor was aware that the insurance company or guarantor would have to pay out even in the face of any 'contestation or protest' by the subcontractor. The subcontractor's remedy is to sue the main contractor for damages as it has in fact done. In the meantime the main contractor cannot be stopped from seeking to be paid pursuant to the performance bond. If the plaintiff succeeds in its action, that the defendant had drawn on the performance bond, can and will no doubt be taken into account by the Court in assessing damages.

- b*
- The interim injunction granted to the plaintiff on February 15, 1985 (see the Order, encl. (9)) is dissolved. The Senior Assistant Registrar of the Court shall upon application therefore inquire into and assess the damages (if any) suffered by the defendant as a result of the said interim injunction having been granted and the plaintiff shall pay to the defendant such damages and the costs of and incidental to such inquiry and assessment as well as the costs of an incidental to this motion.
- c*

- d* It would be germane to mention that the plaintiff subcontractor in the *Hemis Interco's* case had filed a substantive action by writ summons for damages, arising from the wrongful repudiation of the contract as well as for a declaration that the defendant main contractor was not entitled to demand from the insurance company payment under the performance bond and the plaintiff subcontractor also sought for an injunction restraining the defendant who was
- e* the main contractor from seeking payment under the performance bond. In short, in the *Hemis Interco's* case the injunction arose from a substantive cause of action, in respect of which a declaration was sought. In the words of VC George J at p. 564 of the report:

- f* It caused a writ to issue against the main contractor suing *inter alia* for damages said to arise from the 'wrongful repudiation' of the contract as well as for a declaration that the main contractor is not entitled to demand from the insurance company payment under the performance bond and for an injunction restraining the main contractor from doing so.

- g* Having caused the writ to issue the subcontractor plaintiff by an *ex parte* application sought and obtained an interlocutory injunction restraining the main contractor defendant from seeking payment under the performance bond.

Whereas in the present case, the plaintiff by writ action claimed for (see encl. 2):

- h*
- (a) the certified and recommended sum of RM391,116.67 under the interim valuation certificate number 10;
 - (b) interest at 8% per annum from date of filing of the writ to the date of full settlement;
- i*

(c) costs of the action; and

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(d) any other relief which this Honourable Court deems fit and proper

as well as the relevant orders as set out in encl. 29 which had been reproduced in the early part of this judgment. It is appropriate to mention that the plaintiff in the present case had, on 15 August 1998, obtained by way of an *ex parte* summons in chambers in encl. 29 an interlocutory injunction to restrain the defendant in the present case personally and/or by its representatives and/or by its agents and/or by its workers, from receiving any payment from Standard Chartered Bank under performance bond number 300020128832 dated 7 September 1996, until the conclusion of the present action or, in the alternative, until disposal of the arbitration proceedings. It is also appropriate to mention that in the present case the interlocutory injunction which the plaintiff obtained was not grounded upon any substantive action in respect of the performance bond.

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It must be recalled that in the *Hemis Interco*'s case, VC George J (as he then was) held that the plaintiff subcontractor was not entitled to challenge the validity of the insurance guarantee since it was prepared on the instruction of the plaintiff subcontractor and his Lordship also held that since the parties to the insurance guarantee were the defendant main contractor and the insurance company, the plaintiff subcontractor who was not a party to the insurance guarantee could not challenge the validity of the insurance guarantee. In the present case, the performance bond was not only issued by Standard Chartered Bank at the instruction of the plaintiff, it was also subsequently extended at the instruction of the plaintiff. Using *Hemis Interco*'s case as an authority it was argued by the defendant in the present case that the plaintiff was not entitled to challenge the validity of the performance bond because any challenge as to its validity would rest solely between Standard Chartered Bank who was the guarantor under the performance bond and the defendant who was described as the principal in the performance bond. But Mr. Shanmugaraj CT Pillai argued that surely the plaintiff in the present case was entitled to question the validity of the performance bond by relying solely on the concept of "*locus standi*". He further argued that the decision of VC George J (as he then was) in the *Hemis Interco* was a very isolated instance. He pointed out that VC George J (as he then was) did not discuss nor enunciate any clear principles of law in *Hemis Interco* and hence no clear *ratio* can be drawn from it. He submitted that the issue of *locus standi* was not canvassed by way of an argument in the numerous English and Malaysian cases on performance bonds because the issue of *locus standi* was a non issue. He ingeniously argued that if there was any legal basis or substance in the issue of *locus standi*, the

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- a* principal's application (referring to the present plaintiff's application) to seek an injunction, interlocutory or permanent against Standard Chartered Bank or the beneficiary or both would fail in limine. He then pointed out, quite rightly, that there would be no necessity for the court to go any further than to ask the principal (referring to the present plaintiff): "Do you have *locus standi* to make this application?"
- b*

- Proceeding further in the same vein, Mr Shanmugaraj CT Pillai submitted with vigour and vitality to the effect that the plaintiff as the principal has both the legal and the equitable rights to seek an injunction in regard to the performance under the performance bond and at the same time the legal right to challenge the validity of the performance bond although the plaintiff was not a party to it. He submitted that although the plaintiff was without contractual privity to the performance bond, yet the plaintiff was neither a stranger to the making of the performance bond nor to the performance under the bond. All these submissions were indeed thought provoking. But in order to appreciate the scope and extent of the legal and equitable rights of the plaintiff in the context of the performance bond, three sets of contracts involving the two parties to the underlying contract and the bank must be highlighted:
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- d*

- (a) the underlying contract between the plaintiff, on the one hand, and that of the defendant, on the other hand, with the defendant as the beneficiary;
- e*
- (b) the contract between the plaintiff, on the one hand, and that of the bank, on the other hand, wherein the bank promises to pay to the defendant a sum of money up to a specified limit – in the present case the quantum came up to RM128,000; and
- f*
- (c) the contract of guarantee between the bank, on the one hand, and the defendant, on the other hand.

- I must at once say that all the three sets of contracts as alluded to above must surely be related and interwoven with one another. It cannot be denied that the underlying contract must refer to the principal contract and contracts under categories (b) and (c) must be construed to be subsidiaries and collaterals to the underlying contract for the simple reason that the contract under category (a) can exist independently by itself whereas the contracts under categories (b) and (c) were born out of a term in the contract under category (a). In short, the existence of the contracts under categories (b) and (c) depended on the existence of the contract under category (a).
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- Perhaps one ground may be advanced in order to establish the legal or contractual right of the plaintiff here to challenge the validity of the performance bond or even the right of the plaintiff here to seek an injunction
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against the present defendant. That ground would be based on the promise made in the underlying contract. It must not be forgotten that the plaintiff here merely sought relief against the defendant and not against Standard Chartered Bank. The *locus standi* of the plaintiff here centred and founded entirely on the underlying contract which contract can readily be seen at exh. "HYK1" of encl. 28 where under the category of "performance bond" under column "scope of works" it was stated that:

If the contractor fails to execute the Contract or commits any breach of his obligations under this contract, the employer may utilise and make payment out of or deductions from the performance bond in accordance with the terms of this contract.

Now, since reference to the performance bond was made in the underlying contract to which the plaintiff was privy, this meant that the plaintiff has the right to pry open, analyse, review and even question the validity of the performance bond as a whole or for that matter to question any term or condition as set out in the performance bond. Alluding to the paragraph on performance bond as reproduced above, I may be forgiven when I say that it was expressly worded or even impliedly worded that the employer – referring to the defendant, may only receive, utilise and make payments out of or deductions from a valid performance bond. To me the word "valid" is redundant as it would be absurd to utilise and make payment out of or to deduct from an invalid performance bond. It would be reasonable to construe that the parties contemplated a valid performance bond to be in force at all material times. Now, since a valid performance bond was in the contemplation of the parties, it would be appropriate to say – indeed proper to say that it was open to either party to challenge the validity of the performance bond. Even the defendant too as the employer was entitled to challenge the validity of the performance bond as against the plaintiff and to seek a declaration that since an invalid performance bond had been furnished, the condition precedent had not been satisfied and, consequently, there was a breach of the underlying contract. But fortunately for the present exercise, the defendant was not interested in seeking those rights. It was the plaintiff who was interested in challenging the validity of the performance bond in order to prevent the conferment of any benefit to the defendant under an invalid or illegal performance bond. At this juncture, it would be ideal to refer to the case of *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149, a decision of the Supreme Court where Peh Swee Chin FCJ had the honour of writing the judgment for the Supreme Court. That was a case where the bank guarantee was in the form of a letter and not by way of an agreement. On the question of performance bond, this was what Peh Swee Chin FCJ had to say at p. 156 of the report:

- a** It is obvious that the word 'bond' is a loose, general term, used also to include a group of documents or legal instruments such as a contract of guarantee, or of indemnity or an undertaking to pay. Any attributive word before the word 'bond' usually refers to the purpose of the bond such as tender bonds, performance bonds, etc. Performance bonds are almost invariably contracts of guarantee and so named presumably to give that extra air of solemnity.
- b** Conventional wisdom has it that in the world of commerce, trustworthiness is a byword for doing business and a performance bond thus plays a crucial role causing more business to be formed and to be transacted. In our view, Kerr J put it very well in *Harbottle v. National Westminster Bank* [1978] QB 146 at pp 155-156; [1977] 2 All ER 862 at p. 870; [1977] 3 WLR 752 at p 761 by stating:
- c**
- d** It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take.
- e**
- f** Lord Denning in *Edward Owen Engineering v. Barclays Bank International* [1978] QB 159; [1978] 1 All ER 976; [1977] 3 WLR 764 went so far as to say, 'these performance guarantees are virtually promissory notes payable on demand', and approximated them as letters of credit. Lord Denning's description has of course since come in for a great deal of flak from a good number of people, including academics, justifiably or unjustifiably. We endorse fully, however, the view of an eminent local academic that the said description could have served to cloud the real issue, which is one of contractual interpretation of a performance bond and not of the nature of the transaction - '*Calls on Performance Bonds in Malaysia* - the Current Law' by Prof Vincent Powell-Smith [1992] 2 MLJ i.
- g**
- h** That the real issue of a performance bond is one of contractual interpretation was the unanimous view of three judges in the Court of Appeal in *IE Contractors Ltd v. Lloyds Bank plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496; [1991] 51 BLR 1. It is not our intention to write an essay on performance bonds, in the instant appeal, except to repeat that it 'involves a straightforward exercise of construction, or interpretation, of the bond to discover the intention of the parties' - per Sir Denys Buckley in *IE Contractors* [1990] 2 Lloyd's Rep 496 at p 503; (1991) 51 BLR 1 at p 15.
- i**

At p. 158 of the report of the same judgment, his Lordship Peh Swee Chin FCJ rounded up the matter in these salient words:

However, in the instant appeal, the interlocutory injunction was granted not against Bank Bumiputra but against the beneficiary of the said performance bonds in an action against the same beneficiary, ie the buyer, so that Bank Bumiputra was in effect similarly restrained, understandably for fear of the contempt proceedings. In our view, further, Bank Bumiputra was not a party to the underlying contract or contracts between the buyer or seller. The right of the seller to the ancillary relief of an interlocutory injunction could arise out of such alleged invasion of the right of the seller ie the plaintiff, by the buyer, ie the defendant, under the said contracts between the seller and the buyer. Therefore, despite the resulting effect that it would restrain Bank Bumiputra, it could not prevent the seller from applying for an interlocutory injunction.

There is a passage that appears in a book entitled "*Nelson's Law Of Injunctions*", 3rd edn, 1996 version that sets out the brief facts of the case known as *EM and EM Associates v. Delhi Development Authority* [1986] 30 DLT 163 at pp. 164, 165 and that passage certainly merits reproduction and I shall now reproduce that passage:

Injunction restraining from encashing the bank guarantee. – Application brought under Sec. 41 read with Second Schedule of the Arbitration Act, 1940, and Order XXXIX, rules 1 and 2 of the Code of Civil Procedure the petitioner Associates seeks a stay against the respondent Delhi Development Authority, their officers, agents and servants from encashing the bank guarantee/guarantee bond No. 44/82 for Rs.46,300. The perusal of the bank guarantee shows that the Syndicate Bank undertook to pay the amount due and payable under this guarantee without any demur on demand from the D.D.A. stating that the amount claimed is due by way of loss or damages caused to or would be caused to or suffered by the D.D.A. by reason of any breach on the part of the petitioner-contractor of any of the terms and conditions contained in the original contract between the parties on the basis of which this bank guarantee was given by the bank. The contention of the respondent/D.D.A. that this bank guarantee was contract only between the bank on the one hand and the D.D.A. on the other for which reason the petitioner contractor was not competent to move this stay application in respect of the invoking of the bank guarantee, does not appear to be tenable because the bank guarantee has arisen out of the original main contract between the petitioner on the one hand and respondent/D.D.A. on the other and the money covered under the bank guarantee, even though payable by the bank, shall ultimately remain the liability of the petitioner-contractor. In view of the above discussion, D.D.A. is restrained from encashing the bank guarantee on the basis of the aforesaid letter dated 15th October, 1984, on account of its defective nature *EM and EM Associates v. Delhi Development Authority*, [1986] 30 D.L.T. 163 at pp. 164, 165.

- a* and I must say that the *locus standi* of the plaintiff here was fortified by the fact that it was burdened by the performance of the contract between Standard Chartered Bank and the defendant since ultimately it would be the plaintiff here that would have to pay or suffer the damage ensuing from the performance under the performance bond. That brilliant judge by the name
- b* of Abdoolcader J (as he then was) expounded the law on *locus standi* in fine style in the case of *Tan Sri Haji Othman Saat v. Mohamed Bin Ismail* [1982] 2 MLJ 177, and at p. 179 of the report his Lordship succinctly said:

- c* The sensible approach in the matter of *locus standi* in injunctions and declarations would be that as a matter of jurisdiction, an assertion of an infringement of a contractual or a proprietary right, the commission of a tort, a statutory right or the breach of a statute which affects the plaintiff's interests substantially or where the plaintiff has some genuine interest in having his legal position declared, even though he could get no other relief, should suffice. When it comes however to the question of discretion on a consideration of
- d* the substantive application, it may well be proper in particular cases to refuse a remedy to persons who, though they may have standing as a matter of jurisdiction on the lines we have indicated, do not merit it, perhaps because *inter alia*, others are more directly affected, or the plaintiff himself is fundamentally not.

- e* Quite apart from the issue of *locus standi*, the plaintiff by way of an affidavit in encl. 28 stressed that the issue in regard to the validity of the performance bond and the question of the breach thereto were said to be serious issues which called for a trial. To be precise, this was what the plaintiff averred to through Hiew in encl. 28 at para. 9 thereof.

- f* In the premises, I aver that there is a serious issue to be tried in relation to the right of the defendant to call upon the performance bond. In the circumstances of the case, until the matter is decided by the court or arbitration, as the case may be, the *status quo* of the parties should be preserved, in particular after the defendant has withheld a sum of RM455,042.37 which is more than 3 times the value of the water proofing works. The balance of
- g* convenience lies with the plaintiff ...

- h* Indeed the validity of the performance bond and its breach thereto should rightly be decided by the court after a full blown trial. Trial by affidavit evidence would simply not do and would not do justice to the parties at all. But in the meantime, by way of para. 5.1 of the affidavit in encl. 28, the plaintiff expressly admitted that the performance bond of RM128,000 was provided by the plaintiff. The plaintiff too, it must be recalled, did not deny that the performance bond was in fact extended at the request of the plaintiff as evidenced by exh. "HYK5" of encl. 28. These admissions must be viewed
- i* in the context of the case of *Hemis Interco*. Mr. Johanan Puthuceary for the

defendant, in style, submitted that the facts in the present suit bore a striking similarity and resemblance with that of the facts in *Hemis Interco*. I must admit that there was in fact a strand of similarity between the present case with that of *Hemis Interco*. That similarity would be along these lines: it involves an argument by a party attempting to question a performance bond given at their request, and to which the said party was not privy to. It was in these perspectives that the case of *Hemis Interco* was decided and so it was urged upon me to vigorously apply *Hemis Interco* and ruled in favour of the defendant in the present case. Mr. Johanan Puthuchearry also argued, quite convincingly, that the plaintiff ought not to highlight nor focus on using labels like “*locus standi*” and “privity of contract” in order to extricate itself out of the dilemma in which it has woven itself into. It was pointed out that the plaintiff was in error when it argued that the issue of *locus standi* was never raised nor canvassed before the Supreme Court in the case of *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd (supra)*. At this juncture, it would be opportune to examine the facts of *Esso Petroleum Malaysia Inc (supra)*. That was a case where the buyer – Esso Petroleum Malaysia Inc., contracted with Petroliam Nasional Bhd to construct a plant known as a “slugcatcher” for which certain pipes and piping materials were required by the contractor employed by the buyer. The buyer agreed with the seller – Kago Petroleum Sdn Bhd, for the latter to sell and deliver such pipes and materials from time to time on certain specified dates to the buyer for the use of the said contractor. The delivery of these pipes and piping materials on the specified dates were regarded as important to both parties. The terms of the sale were set out in the various purchase orders. It was agreed that if the seller was late in delivering the goods as ordered, the buyer was permitted to deduct as liquidated damages 1% of the value of the respective purchase order for each week or part thereof up to a maximum of 10%. In accordance with the terms of the purchase orders, the buyer made deductions in payment whenever the seller was late. Notwithstanding this agreement, the buyer agreed to refund the deduction in the event the “cost impact” was found to be less. With this new ingredient of “cost impact”, the ascertainment of liquidated damages was found to be more complicated than previously anticipated by the parties resulting in a delay in deductions as damages. It was then decided between the parties that the buyer would release and pay the seller German Marks – DM482,202, being the total amount of deduction in exchange for two letters of guarantee issued by Bank Bumiputra Malaysia Bhd for the sums of DM466,562 and DM17,640. The two performance bonds were identical except for the different sums guaranteed and the different guarantee numbers used for identification purposes. Subsequently, the buyer ascertained the cost impact of the delays and concluded that damages for such delays had come up to the level of 90% out of the total sum of DM484,202. The buyer then requested for payment of the sum of DM435,781.80 which represented 90% of the sum

- a* of DM484,202 and that such payment was to be made within a period of seven days. In response, the seller then requested for further and better particulars in order to justify the buyer's claim for payment up to the 90% level. The buyer did not respond but instead called on the performance bond by letter dated 11 October 1993. This prompted the seller to file a civil suit
- b* and later the seller obtained an *ex parte* injunction restraining the buyer from receiving a total sum of DM484,202 under the two performance bonds. The buyer applied to set aside the injunctions but the High Court dismissed the buyer's application with costs. Being aggrieved, the buyer then appealed to the Supreme Court. The buyer succeeded in the Supreme Court and the interlocutory injunction was set aside.
- c*

- On reflection it is germane to mention that the performance bonds in *Esso Petroleum Malaysia Inc* arose as a direct result from the difficulties of the buyer to properly and efficiently calculate the damages that were due under the purchase orders. Put in another way, the performance bonds arose after
- d* deductions were made arising from the default of the seller in regard to the timely delivery of the pipes and piping materials. The buyer had paid the full sum of DM482,202 which represented the estimated liquidated damages owing by the seller, in exchange for the two performance bonds issued at the request of the seller. It would be appropriate to say that the two performance bonds
- e* were inextricably woven, like a cocoon, with the question of the breach of the underlying contract, namely the purchase orders. However, the Supreme Court in the *Esso Petroleum Malaysia Inc* were concerned with the questions of whether the performance bonds were independent from the underlying contract and whether the demand on the performance bonds was sufficient to trigger payment. His Lordship Peh Swee Chin FCJ, correctly applied, when
- f* writing for the Supreme Court in the *Esso Petroleum Malaysia Inc* the English Court of Appeal case of *IE Contractors Ltd v. Lloyds Bank plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496; [1991] 51 BLR 1 which laid down the principle that it was purely a matter of contractual interpretation when deciding the issue of a performance bond. At p. 156 to p. 157 of the report, his
- g* Lordship Peh Swee Chin FCJ had this to say:

- Looking at the performance bond (bank guarantee No 065-92-106) as set out above, it was stated to be an 'unconditional' guarantee. The only other thing of note would be the stated requirement that all claims must be made in writing.
- h* This performance bond was, on a true construction, a pure on demand guarantee, and all that was required to trigger it was a demand in writing. It would not be dependent or conditional on the production of a document, eg a certificate from some nominated independent person like an architect as in some building contracts, etc. Neither was it worded to make it conditional for Bank Bumiputra, the issuer of the performance bond, to inquire into the existence
- i* or otherwise of any breach of any contractual obligation between the beneficiary of the bond, ie the buyer in this case, and the seller; at the behest of the latter

itself, the performance bond was issued. It was not even worded to make it conditional on a simple declaration by the beneficiary, without proof to its issuer, that the seller had not paid damages to the buyer after the release by the buyer of the sum of DM466,562. In fact, the present performance bond, had it been worded, eg to require any proof of breach by the buyer so as to deserve any payment, then, in such event, its commercial acceptability as a performance bond, would be mostly lost.

It would be pertinent to point out that there were ambiguities in the case of *Esso Petroleum Malaysia Inc*. In the purchase orders, the parties were said to be *Esso Petroleum Malaysia Inc* and *Kago Petroleum Sdn Bhd*. But from the wording of the bank guarantee, it appears that the parties thereto were not the plaintiff nor the defendant. That bank guarantee was worded as follows:

In consideration of Esso Production Malaysia Inc agreeing to release Perbadanan Ladang-Ladang Haji Sdn Bhd (PLLTH).

Thus, there was no mention at all of Esso Petroleum Malaysia Inc or Kago Petroleum Sdn Bhd in the bank guarantee at all. Even the letter of demand dated 11 October 1993 was issued by Esso Production Malaysia Inc and not Esso Petroleum Malaysia Inc. In addition to that, the wording of the letter of demand referred to bank guarantee issued by Bank Bumiputra Malaysia Bhd in respect of several purchase orders allegedly made between Esso Production Malaysia Inc and Kago Petroleum Sdn Bhd., whereas the bank guarantee issued by Bank Bumiputra Malaysia Bhd specifically referred to several purchase orders made between Esso Production Malaysia Inc. and Perbadanan Ladang-Ladang Tabung Haji Sdn Bhd., and not Esso Petroleum Malaysia Inc. But Peh Swee Chin FCJ with a wealth of experience to his credit dealt with these ambiguities in this way (see p. 157 of the report in the case of *Esso Petroleum Malaysia Inc*):

One, therefore, looked at the letter dated 11 October 1993 as set out above which was supposed to trigger the operation of the instant performance bonds. There was nothing there that could suggest that the demand was not proper and, complying with the simple words there of making a claim by 'a demand in writing', the said letter was sufficiently compliant even though it was verbose.

In the court of the first instance in *IE Contractors* [1989] 2 Lloyd's Rep 205, Leggatt J held that the demand made to Rafidain Bank was invalid, *inter alia*, for not stating that the demand was 'for damages, etc' as set out in the bond therein, but the Court of Appeal (Staughton and Purchas LJ and Sir Denys Buckley) in *IE Contractors* [1990] 2 Lloyd's Rep 496; [1991] 51 BLR 1, declined to adopt such a requirement of strict compliance with the words and that notwithstanding that the precise words 'for damages, etc' were not used, a valid demand was made. We wish to associate ourselves with that rather common sense approach. If words are in apparent conformity with the wording in any particular bond, they are sufficient.

- a* The defendant asserted that the approach was quite simple: just take a look at the performance bond and construe it accordingly which would certainly entitle the defendant to call on the performance bond. Whereas the plaintiff said that before embarking on the exercise or putting in motion the rigmarole of construing the performance bond, the court must first ascertain the validity
- b* of the performance bond bearing in mind that the performance bond in question was not signed by the defendant coupled by the fact that it was wanting in particulars. The plaintiff added another obstacle and it was the submission of Mr. Shanmugaraj CT Pillai that there was a need to refer to the underlying contract between the plaintiff and the defendant before the defendant could call on the performance bond. Must I follow *Hemis Interco* and rule that the
- c* plaintiff cannot challenge the validity of the performance bond and that the validity of the performance bond was a matter entirely between the defendant and Standard Chartered Bank? With respect, VC George J's (as he then was) approach in *Hemis Interco* was quite novel. It was an isolated instance of judicial novelty. His Lordship VC George J (as he then was) relied heavily
- d* on the authorities of *Edward Owen Engineering Ltd v. Barclays Bank International Ltd* [1978] 1 QB 159 and *RD Harbottle v. National Westminster Bank* [1977] 2 All ER 862 in arriving at his decision. But with respect these two well known performance bond cases together with *Bolivinter Oil SA v. Chase Manhattan Bank* [1984] 1 WLR 392 had the following common thread
- e* running through them:
- (1) that the applicants applied for injunctions to restrain the banks from making payments and the other contracting parties as well from calling on the performance bonds;
- f* (2) that the courts held that the performance bonds or guarantees were to be treated like letters of credits, so that the banks must be allowed to honour their payment obligations upon demand by the beneficiaries.
- g* All these performance bond cases can readily be distinguished from the facts of the present case. Those cases were not concerned with the disputes between the contracting parties under their underlying contracts, unlike the present case at hand. Indeed this approach of mine found judicial support in the case of *Royal Design Studio Pte Ltd v. Chang Development Pte Ltd* [1991] 2 MLJ 229, a decision of Thean J of the High Court of Singapore. That was a case
- h* where the plaintiff there agreed to construct a number of terrace houses on the defendant's land. The defendant agreed to convey, upon completion of the terrace houses and the issuance of the temporary occupation licences, some units of the said houses to the plaintiff. In return, the plaintiff was to deliver to the defendant a performance bond and a personal guarantee by one of the plaintiff's directors to secure completion of the construction of the terrace
- i*

houses. The performance bond was initially to be in the region of S\$165,000 and this amount was later reduced to S\$125,000. The director's guarantee was for S\$1 million. The plaintiff duly complied. Later a dispute arose and in the course of that dispute the plaintiff complained that interim payments from the defendant were late which in turn delayed the works. On the other hand, the defendant argued that the plaintiff had failed to complete the construction of the terrace houses in time. As a last salvo, the defendant by notice terminated the agreement and requested the plaintiff to vacate the premises. The plaintiff applied for two interim injunctions. The relevant one for this exercise was that the plaintiff sought to restrain the defendant from calling on and to receive payment under the performance bond. Thean J held that where the dispute was only between the parties of the underlying contract and did not involve the bank, the court could and was entitled to take into account all the relevant facts including the dispute on the main contract in deciding the crucial question of whether to prevent a demand on the performance bond. Thean J was of the view that the similarity between the performance bond and the letter of credit was not sufficient to prevent an inquiry of that nature. Now, in the context of the present case, I should not be concerned with endangering the commercial reputation of the bank in question – namely, Standard Chartered Bank, after all the injunction was not against the said bank. It must be emphasised that in the *Edward Owen Engineering Ltd's* case (*supra*), that great judge – Lord Denning MR, acknowledged that the issue of the performance bond was a “new creature” to the court and his Lordship steadfastly held that performance bond should stand at par with the letter of credit because in both situations the bank was not concerned with the underlying contract and must be held accountable to pay upon demand, unless there was evidence of a clear fraud. Incidentally in the context of the present case there was no allegation of fraud whatsoever.

I would accordingly answer the question posed under this head in the affirmative. The plaintiff certainly has the *locus standi* to challenge the validity of the performance bond.

Whether The Plaintiff Has The Substantive Action To Be Entitled To The Interlocutory Relief Of An Injunction?

It was argued that the plaintiff was entitled to seek the relief of an interlocutory injunction notwithstanding that the relief of a permanent injunction was not sought or prayed for in the writ. It was the stand of the plaintiff that an interlocutory injunction was only ancillary to the main cause of action in the writ and that an application thereto can be filed by the plaintiff or by the defendant, where a cross-claim has been filed, for the purpose of preserving the status quo of the parties until final adjudication of the rights

a of the parties. In the *Malaysian High Court Practice*, 1998 Desk Edition, the explanatory note to O. 29 r. 1(2) of the Rules of the High Court 1980 ("RHC") states as follows:

b An interlocutory injunction, whether it be prohibitory or mandatory, is granted at any period of a suit and its effect is to bind the party against whom it is sought for a specific period of time pending the outcome of the suit. Its purpose is to maintain the *status quo* of the parties until the issues have been adjudicated. An injunction which forbids the doing of an act is prohibitory, while an injunction which directs the defendant to do something to repair an omission is mandatory: *Mbf Holdings Bhd v. East Asiatic Co (Malaysia) Bhd* [1995] 3 MLJ 49.

c and O. 29 r. 1(1) of the RHC states as follows:

d An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.

e and flowing from these it can safely be said that what was important and relevant to the occasion would be whether the plaintiff has a valid cause of action to justify the application for an interlocutory injunction. Was there a valid cause of action? According to Syed Agil Barakbah SCJ in *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 MLJ 230, 236:

f A cause of action is simply a factual situation the existence of which entitles a plaintiff to obtain from the Court a remedy against the defendant. (See Diplock LJ in *Letang v. Cooper* [1965] 1 QB 232, 242-3). There must be a cause of action before a plaintiff can claim a relief in an action. (See Order 15 rule 1 RHC 1980).

Salleh Abas LP in *Government of Malaysia v. Lim Kit Siang, United Engineers (M) Berhad v. Lim Kit Siang* [1988] 1 CLJ 219 at p. 222 aptly described the meaning of a cause of action in these refined words:

g What then is the meaning of 'a cause of action'? 'A cause of action' is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. Lord Diplock in *Letang v. Cooper* [1965] 1 QB 232 at p. 242 defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person'. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and that, secondly, such right has been affected or prejudicated by the appellant/defendant's act.

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Now, on perusal of the statement of claim, the plaintiff's cause of action was founded on the breach of an underlying contract. The writ that was filed on 5 March 1998 as seen in encl. 2 was entirely based on an action for breach of contract by the defendant as a result of the defendant's refusal to pay a certified sum of RM391,116.67 that was due to the plaintiff under interim certificate number ten. The defendant took the stand, as reflected in its affidavits in support of its application for a stay of proceedings to refer the matter to arbitration as seen in encl. 8, and had raised the issue of defects and alleged that the plaintiff had failed to execute or perform the contract and the defendant too alluded to its entitlement to set off the cost of rectification against the money claimed by the plaintiff. The thrust of the defendant's allegations in its affidavits centred on the plaintiff's failure to execute or perform the underlying contract which was the very basis to activate the performance bond. Even though the statement of defence had yet to be filed and that it would be filed later as agreed upon by the parties, it can safely be inferred that the defendant's defence will be structured along the lines of these allegations if the matter finally proceed to trial or arbitration. In short, both the plaintiff and the defendant's claims were centred on breaches of contract. These would certainly be the subject of an interesting discourse in the course of the trial or by way of an arbitration. In my judgment, it would be absurd and tantamount to being perverse if the court were to make a finding that there was no breach of contract by the plaintiff and yet at the same time allowed the defendant to call on the performance bond. Seen in this perspective, the balance of risk of doing injustice favoured the plaintiff and that being the case the best solution to adopt would be to maintain the status quo by preserving the interlocutory injunction.

In my judgment, from the totality of the facts, the plaintiff who sought an interlocutory injunction had shown a cause of action within the framework of *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 (CA). This was a case where the plaintiff had not only shown a valid cause of action (*RCA Sdn Bhd v. Pekerja-Pekerja RCA Sdn Bhd & Ors* [1991] 1 MLJ 309; and *Associated Newspapers Group v. Insert Media Ltd* [1988] 2 All ER 420) but it had also shown a *prima facie* valid cause of action and there was thus no necessity for the plaintiff to show that it will definitely succeed in that cause of action. In law, the plaintiff needs only to show that there was indeed a serious question to be tried.

An injunction is certainly one of the orders that a court may make under its equitable jurisdiction. It is certainly a discretionary remedy and will usually be granted in circumstances in which the court deems fit. The principles

- a* applicable in determining whether to grant an application for an injunction are found in the famous case of *American Cyanamid Co. v. Ethicon Ltd* [1975] AC 396 and it can be summarised as follows:

- (1) whether there is “a serious question to be tried”;
- b* (2) whether on the balance of convenience it would be just and equitable for the court to issue the injunction.

- It is a correct statement of the law to state that the balance of convenience test seeks to weigh the potential prejudice to each party should the court incline either way. Lord Diplock prescribed the following approach in determining
- c* whether to grant an interim injunction or otherwise and his Lordship laid down that approach in the case of *American Cyanamid Co v. Ethicon Ltd (supra)*, particularly at p. 408 thereof:

- d* The governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendants continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial
- e* position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appeared to be at that stage.

- If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that if the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff’s undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them,
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- g* there would be no reason upon this ground to refuse an interlocutory injunction.

- The balance of convenience test was later described as “the balance of the risk of doing an injustice” (*Cayne v. Global Natural Resources plc* [1984] 1 All ER 225 at 237; and *Films Rover International Ltd v. Cannon Film Sales Ltd* [1987] 1 WLR 672 at 680). The law develops at a speedy pace and it moves with the time. Thus, the *American Cyanamid* approach seen in the context of performance bonds and documentary credit transactions has been displaced and replaced by a test based on proof of a “clear case of fraud” (*Brody White & Co. v. Chemet Handel Trading (S) Pte Ltd* [1993] 1 SLR 65
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at 70). It seemed that the ground for displacement and to raise the level of the test by incorporating an examination of the strength of the evidence to that of “clear proof of fraud” was prompted and arose in a situation where an injunction was sought against a bank. I think I should elaborate further. Under the *American Cyanamid* test, the object of the inquiry at the first stage was whether there was in existence a “real prospect of succeeding in his claim for permanent injunction at the trial” (see p. 408 of the report). At that stage, the focus was not on the strength of the evidence to prove the case nor was it on the probability of success at the trial (*Alfred Dunhill Ltd v. Sunoptic SA* [1979] FSR 337 at 373, particularly the judgment of Browne LJ) but rather it revolved on the question of “whether the evidence reveals issues which enable the plaintiff to succeed” (*Hong Kong Vegetables Oil Co. v. Malin Sirinaga Wicker & Ors* [1978] 2 MLJ 13; and *Cayne v. Global Natural Resources plc.* (*supra*)). It was purely a question of perception which displaced the test as alluded to in the *American Cyanamid*. It was thought that the *American Cyanamid* test was too lenient and that the bank needed better protection. It was felt that the bank needed protection for the bank was said to be at great risk of being prejudiced without a sufficiently strong cause. The bank was normally said to be in the dark as to what had transpired between the applicant and the beneficiary. It was to stabilise this imbalance of information that a higher level of test was needed. All these would surely be good to Standard Chartered Bank provided it was cited as a party. Here, Standard Chartered Bank was not cited as a party at all unlike the cases of *Edward Owen Engineering Ltd v. Barclays Bank International Ltd* (*supra*); *RD Harbottle v. National Westminster Bank* (*supra*); and *Bolivinter Oil SA v. Chase Manhattan Bank* (*supra*).

So much for the law.

On the facts of the present case, I would answer the question posed in the affirmative. There was a substantive cause of action that entitled the plaintiff to the interlocutory relief of an injunction. This was my judgment and I so hold accordingly.

Be that as it may, lest I be accused of an oversight, I must say that the defendant was questioning whether a challenge to the validity of the performance bond by the plaintiff would entitle the plaintiff to an injunction. The case of *Bocotra Construction Pte Ltd & Ors v. Attorney General (No 2)* [1995] 2 SLR 733 was alluded to. That was a case of the Court of Appeal of Singapore where it held, *inter alia*, that a challenge to the validity of the performance bond or performance guarantee was not a ground for an injunction and that case followed our own Supreme Court decision of *Esso Petroleum*

- a* v. *Kago Petroleum Sdn Bhd (supra)*. That case too departed from the earlier “judicial thinking” in regard to performance bonds as expounded by two Singapore High Court decisions of *Royal Design Studio v. Chang Development* [1991] 2 MLJ 229 and *Kvaerner Singapore Pte Ltd v. UDL Shipbuilding (Pte) Ltd* [1993] 3 SLR 350.
- b* I will now proceed to narrate the facts in *Bocotra Construction (No 2)*. In that case the appellants were contractors commissioned by the Public Works Department (PWD) to undertake certain engineering works involving what was called the Central Expressway (CTE). A performance guarantee was issued to the PWD by a bank on the instructions of the appellants. The appellants failed
- c* to complete the works according to the schedule and a dispute ensued between the parties. The appellants claimed that the delay was due to two factors:
- (1) errors contained in the respondent’s drawings and specifications; and
- (2) maladministration on the part of the respondent.
- d* The respondent counterclaimed for cost of remedial works necessary to rectify defects in the construction of the tunnels. Both matters were referred to arbitration in accordance with the arbitration clause in the construction contract. Before determination of the dispute by the arbitrator, the respondent notified
- e* the appellants and the bank of its intention to call for payment on the guarantee. The appellants then sought and obtained from the arbitrator, Tun Mohamad Suffian, a restraining order requiring the respondent to desist from making a call on the performance bond. The respondent contested the jurisdiction of the arbitrator to make the order and the Court of Appeal in
- f* *Bocotra Construction Pte Ltd v. Attorney-General* [1995] 2 SLR 523 held that the arbitrator had no jurisdiction to make the order. The appellants subsequently commenced proceedings in the High Court to seek an order on similar terms from the High Court. However, the matter was dismissed with costs. The appellants then appealed to the Court of Appeal which upheld the High Court decision.
- g* As the defendant was a government agency and as s. 27(1) of the Singapore Government Proceedings Act (Cap 121) would come into play, the appellants applied for:
- h* (a) a declaration that the defendant was not entitled to give written notice to a letter of guarantee issued by Standard Chartered Bank; and
- (b) for a further declaration that upon the true construction of the guarantee, the guaranteed sum was only payable upon proof of default by the respondent under the contract dated 27 November 1987.
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The coram of the Court of Appeal of Singapore comprised of Yong Pung How C., Karthigesu and LP Thean JJA. It would be interesting to note that LP Thean J. was the High Court judge that decided the case of *Royal Design Studio v. Chang Development (supra)*. The appellants questioned the validity of the guarantee and argued that the court of the first instance had failed miserably to consider the relevance of the fact that the recital to the guarantee referred to cl. 9 of the conditions. The recital was worded as follows:

... whereas by clause 9 of the conditions of contract, the contractor must provide a bank guarantee for a sum equal to ten per cent (10%) of the contract sum, for the due performance of the contract.

and flowing from this, the submission before the Court of Appeal of Singapore was that the contract itself had qualified the right of the respondent to make a demand on the guarantee. It was also argued that as cl. 1 of the performance guarantee contained an agreement of the bank to pay the respondent “forthwith on demand any sums not exceeding in the aggregate Singapore Dollars Thirty One Million Two Hundred and Eighty Eight Thousand Eight Hundred and Eighty Eight Cents Eighty only (S\$31,288,888.80) upon receipt of any written notice”. Clause 5 in turn subjected the guarantee to a condition that a claim had to be made upon the bank by notice in writing “within six months from the expiry of this guarantee”. On this basis, the appellant submitted that on the face of it this was not an unqualified absolute right to demand. Moreover, the determination of the validity of the guarantee was crucial for the purposes of ascertaining whether the respondent made a claim within the in-built limitation period of six months under cl. 5. Clause 4 specified as follows:

The guarantee is valid from the date hereof up to the date the engineer issues the maintenance certificate in accordance with clause 55 of the conditions of the contract.

By way of a rebuttal, the respondent argued that the appellants had no *locus standi* to question the performance guarantee. It was submitted on behalf of the respondent that the appellants not being a party to the guarantee, had no *locus standi* to question the validity of an independent contract between the bank and the respondent. In deciding this issue, the Singapore Court of Appeal drew guidance from the decision of the English Court of Appeal in the case of *IE Contractors Ltd v. Lloyds Bank plc and Rafidain Bank* [1991] 51 Build. LR 1, where Staughton LJ at p. 9 said:

I take this to show that there is a bias or presumption in favour of the construction which holds a performance bond to be conditioned upon documents rather than facts. But I would not hold the presumption to be irrebuttable, if the meaning is plain.

- a* The Singapore Court of Appeal also approved our Supreme Court's decision in *Esso Petroleum Malaysia Inc. v. Kago Petroleum Sdn Bhd (supra)* which in essence held that the real issue was one of contractual interpretation of the performance bond and not the nature of the transaction.
- b* In the course of the arguments in the *Bocotra Construction (No. 2)*, the appellants also relied on the observations of Donaldson MR in the case of *Bolivinter Oil SA v. Chase Manhattan Bank* [1984] 1 Lloyd's Rep 251, 257 to support their contention that a "substantial challenge" as to the validity of the guarantee would suffice to invoke the court's jurisdiction to grant an injunction restraining the call. This was what Donaldson MR observed in
- c* *Bolivinter*:

- d* Judges who are asked, often at short notice and *ex parte*, to issue an injunction restraining payment by a bank under an irrevocable letter of credit or performance bond or guarantee should ask whether there is any challenge to the validity of the letter, bond or guarantee itself. If there is not or if the challenge is not substantial, *prima facie* no injunction should be granted and the bank should be left free to honour its contractual obligation, although restrictions may well be imposed upon the freedom of the beneficiary to deal with the money after he has received it.

- e* and in answer to this contention, Karthigesu JCA said at p. 744 to p. 745 of the report:

Reading only this passage, the appellants seemed to have some support for their contentions. Nevertheless, Donaldson MR's comments immediately following this passage posed important qualifications:

- f* **The wholly exceptional case** where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge. [Emphasis added.]

- g* Donaldson MR was not suggesting that there should be a new category of exception to the general principle denying injunctions in such cases. Contrary to what the appellants suggested, we do not think that the mere fact that the validity of the guarantee was substantially challenged in other proceedings will automatically provide a basis for an injunction to be obtained restraining an intended call for payment. It will still be in the 'wholly exceptional case' of
- h* fraud that an injunction can be granted.

It was submitted that the rationale adopted by Karthigesu JCA was sound because it was pointed out that in the usual circumstances, a performance bond

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would be drawn at the request of the applicant and would invariably reflect the terms contained in the application thereto. That being the case, any ambiguity should be resolved against the applicant and not against the bank or the beneficiary, so it was submitted.

With respect, Karthigesu JA's judgment in *Bocotra Construction (No 2)* was not that perfect. At p. 748 of the report, he said:

We do not see any reason why the courts should strive to uphold a presumption of infallibility on the appellant's part.

and, with respect, he appears to have pre-judged the issue of casting a "slur on the appellant's reputation, such as to amount to some form of libel" (see p. 748 of the report) and by doing so he had disposed off the matter at an interlocutory stage. I am sure the appellants there did not expect the Court of Appeal of Singapore to uphold a presumption of infallibility at the interlocutory stage and neither did the appellants there expect the Singapore's Court of Appeal to act in a manner that would send a clear signal of the appellants' infallibility. Likewise here, the plaintiff would not expect this court to uphold a presumption of infallibility at this interlocutory stage and neither did the plaintiff expect this court to act in a manner at this stage of the proceeding by sending a clear message of the plaintiff's infallibility. With respect, Karthigesu JA in *Bocotra Construction (No 2)* failed to take into account and weigh in a balance the object and purpose of an interlocutory injunction which would essentially be to maintain the *status quo* of the parties until all the issues have been adjudicated and that would certainly include the infallibility or otherwise of the plaintiff. I am of the considered view that the "damage to reputation" would constitute an essential ingredient to be considered in the "adequacy of damages" or the "balance of convenience" tests. At this juncture, it would be germane to consider and highlight the case of *High Mark (M) Sdn Bhd v. Pacto Malaysia Sdn Bhd* [1985] 1 CLJ 100, a decision of Zakaria Yatim J (as he then was). There his Lordship was dealing with an interim injunction and not on the issue of a performance bond but nevertheless his Lordship held the view that the issue of credibility or reputation was certainly crucial in deciding whether to grant the injunction or not and in this context the decision of his Lordship would certainly be relevant to the factual matrix of the present case. At p. 105 of the report, this is what his Lordship said:

Mr. Wilfred, on the other hand, argued that the damages suffered by the plaintiffs could not be measured and money damages would not be an adequate remedy. In their affidavit in support of the *ex parte* application (encl. 2) the plaintiffs stated,

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- a** My Company and I will also suffer irreparable harm and incalculable loss which cannot be compensated for any damages if the defendants are allowed to induce those who are in my employ to break their contracts with me and I will lose my credibility with other consultants.
- b** In my opinion the passage quoted above is sufficient evidence to show that money damages would not be an adequate remedy. The plaintiff company, as contractor, would lose his credibility with other consultants. Even if it is doubtful as to whether damages would be an adequate remedy, in my view, from the facts shown in the various affidavits, the balance of convenience lies in favour of granting the injunction.
- c** It would also be appropriate to refer to a textbook entitled “*Interlocutory Injunctions*” by Tan Woon Tiang and Koh Kok Wah, 1992 edn, where at p. 8 thereof the learned authors had this to say:
- d** After a court comes to the conclusion that there is a serious question to be tried and either: (i) considers that damages will not be an adequate remedy, or (ii) is unable to arrive at a clear decision on the adequacy of damages to the eventual successful party, it will go on to consider the balance of convenience. For it is ‘where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises’ (per Lord Diplock in the *American Cyanamid* case [1975] 1 All ER 504 at page 511).
- e** The phrase “balance of convenience” has been criticised and it was said to be an “unfortunate expression”. The learned authors of the same textbook at p. 9 had this to say of this expression:
- f** The ‘balance of convenience’ has been described as an unfortunate expression by Sir John Donaldson MR in *Francome v. Mirror Group Newspapers Ltd* [1948] 2 All ER 408 at page 413g. He said:
- g** Our business is justice. Not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are usually asserting wholly inconsistent claims, this is difficult, but we have to do our best. In so doing, we are seeking a balance of justice, not of convenience.
- h** Notwithstanding the correct distinction made by Sir John Donaldson MR between justice and convenience, the expression continues to be used as a convenient description of the process. In certain cases, the process is described as the ‘balance of the risk of doing an injustice’ (see *Cayne & Anor v. Global Natural Resources plc* [1948] 1 All ER 225 at page 237). ‘A fundamental principle is therefore that the court should take whichever course appears to
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carry the lower risk of injustice if it should turn out to have been ‘wrong’ in the sense I have described’ (per Hoffman J in *Films Rover International Ltd v. Cannon Film Sales Ltd* [1986] 3 All ER 772 at page 781a). The ‘guidelines’ propounded for dealing with the balance of convenience should be read in the context of this general objective. **a**

In determining where the balance of convenience lies, all relevant factors should be considered and the appropriate weight given to each factor. Such weight will vary from case to case. Consequently, the court in determining this issue will have an unfettered discretion to deal with each case on its own merits. **b**

Now, in “seeking a balance of justice”, I have tread cautiously by referring to numerous authorities in this judgment. I too have examined the facts and considered the submissions of both counsel in its entirety. This was certainly not an easy case to decide. Should I follow blindly the English Court of Appeal decision in *IE Contractors Ltd v. Lloyds Bank plc and Rafidain Bank (supra)* or the Singapore Court of Appeal decision in the *Bocotra Construction No 2 (supra)* or the Malaysian Supreme Court decision in *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd (supra)*? I must put on record that I am bound by the decision of the Malaysian Supreme Court in *Esso Petroleum Malaysia Inc. v. Kago Petroleum Sdn Bhd (supra)* – a decision emanating from the highest court in the country. Two major factors propelled itself to the forefront in favour of the plaintiff. Firstly, the issue of “damage to reputation”; and, secondly, that there was a very strong *prima facie* case that the performance bond was invalid and void. The “balance of justice” should be the guiding force and applying that phrase generously to the factual matrix of the present case, I would, without hesitation, order that the interlocutory injunction to continue until the conclusion of the trial or the conclusion of the arbitration whichever was relevant. I now made those orders in favour of the plaintiff. **c**
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Addendum

Only recently I was informed that there was an appeal filed by the defendant in regard to my decision. Expeditious despatch was then made to call this file from the Johor Bahru High Court. There was a slight delay in transmitting this file to me. Be that as it may, this judgment was prepared expeditiously on receipt of the relevant file. **g**

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